KSL DC Management, LLC d/b/a Hotel Del Coronado *and* Hotel Employees and Restaurant Employees International Union, Local 30, AFL–CIO, CLC. Cases 21–CA–36119 and 21–CA–36195

August 26, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 13, 2004, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. Employee David A. Hall filed an amicus brief in support of the Respondent's exceptions.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified below and to adopt the recommended Order.

1. We agree with the judge, for the reasons set forth below, that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union as the exclusive representative of a unit of elevator operators, storeroom specialists, spa attendants, and facilities employees.

The Respondent, KSL Management, LLC (the Respondent) operates the Hotel del Coronado. Prior to late 2003, the hotel was operated by Destination Coronado Hotel, Inc. (the predecessor employer). The Predecessor Employer and the Union were parties to a collective-bargaining agreement, effective 2000–2005, that covered hotel culinary, stewarding, dining, convention services, housekeeping, and banquet employees. On September 26, 2001, the Predecessor Employer and the Union entered into a neutrality agreement that governed the parties' conduct during any subsequent union organizing drives at the hotel.

In September 2003,[4] the Union began organizing some unrepresented hotel employees. (At that time, there were two units of hotel employees that were represented by the Union.) On October 6, the Union filed a representation petition seeking an election in a unit that covered the predecessor employer's elevator operators, storeroom specialists, spa attendants, and facilities employees. On October 9, the Union and the predecessor employer entered into a Stipulation for Certification upon Consent Election Agreement for that unit of employees. The Board-conducted election was held on October 30. The Union won the election and was certified as the unit's exclusive bargaining representative on November 7.

The Respondent purchased the Hotel from the predecessor employer on December 18. The Respondent did not hire all of the predecessor's employees and did not adopt the collective-bargaining agreement between the Union and the predecessor, but set its own initial terms and conditions of employment. However, a majority of the employees hired by the Respondent worked for the predecessor, and the Respondent concedes that it is a successor within the meaning of *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

The Union requested that the Respondent recognize it as the bargaining representative of the Hotel's employees that it had represented under the predecessor employer, including those in the newly certified unit. Although the Respondent recognized the Union as representative of the employees in the other two units covered by the predecessor's contract, it refused to recognize and bargain with the Union as the representative of the employees in the newly certified unit.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize the Union as representative of the unit of the Respondent's elevator operators, storeroom specialists, spa attendants, and facilities employees. The Respondent raises several defenses to this allegation. It argues that: (1) the certified unit is not appropriate; (2) the voters in the election had no reasonable expectation of continued employment at the time of the election (because the predecessor informed them on October 17 that it would terminate them); and (3) the predecessor and the Union tainted the

[1] On May 5, 2005, the Board granted the request of David A. Hall to file an amicus brief and accepted the brief that accompanied that request.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 1083 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also contends that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[3] Member Schaumber finds it unnecessary to pass on whether the Respondent, through Manager Eddie Ramirez, violated Sec. 8(a)(1) by telling employee Joaquin Garcia that "it was easier to fire someone since there was no union" when the Union did, in fact, represent the employees, and by telling employees "no seniority, no union." Member Schaumber observes that such findings would be cumulative of the violations found and would not affect the remedy.

[4] All dates are in 2003 unless noted.

election by entering into an unlawful neutrality agreement.

We reject those arguments. We find that the Respondent is procedurally barred from challenging the Union's certification on grounds that the predecessor employer could have raised in the underlying representation case. The Board has held that a successor employer stands in the shoes of its predecessor and may not defend against an allegation that it is unlawfully refusing to recognize and bargain with a certified union by alleging matters that its predecessor could have raised in a prior representation proceeding, absent special circumstances.[5] *New London Convalescent Home*, 274 NLRB 1442 (1985) (barring successor employer from challenging union's certification on grounds that predecessor employer raised or could have raised in prior representation case); *Dynamic Machine Co.*, 221 NLRB 1140, 1142 (1975) (same), enfd. 552 F.2d 1195 (7th Cir. 1977); *Investment Building Cafeteria*, 120 NLRB 38, 43 (1958) (same).

Here, the predecessor employer could have raised each of the issues in the representation case that the Respondent now raises. It did not. Nor do we find any special circumstances in this case that would warrant allowing the Respondent to press its arguments. The fact that the Respondent was not a party to the Board election does not constitute a "special circumstance" that would permit it to challenge the Union's certification. *New London Convalescent Home*, 274 NLRB at 1443 (finding that successor employer had not raised any special circumstances); *Investment Building Cafeteria*, 120 NLRB at 43; cf. *Evangeline of Natchitoches, Inc.*, 323 NLRB 223 (1997) (finding that postcertification decision by Supreme Court constituted "special circumstances") *Brinks Inc. of Florida*, 276 NLRB 1, 2 (1985) (finding special circumstances where employer alleged that certified unit of guards had affiliated with a nonguard union in violation of the Act). Consequently, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union.[6]

2. We adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by temporarily demoting employee Joel Martinez from server to busboy on December 21, 2003. The Respondent claimed that it temporarily demoted Martinez on that date because, on December 14, he "stole" a table that was assigned to another team of employees. The record shows that Martinez and two coworkers, fellow server Florence Hatfield and busboy Zeferino Cortez, served the table at issue. The judge found, and we agree, that the General Counsel satisfied his initial burden of proving that animus was a motivating factor in the decision to temporarily demote Martinez. The judge then found that the Respondent's asserted legitimate justification was pretextual. Specifically, the judge found that the Respondent did not in fact rely on the alleged table theft because the Respondent failed to adequately investigate it before disciplining Martinez. We find that the Respondent's asserted justification was pretextual, but we do not rely on the Respondent's failure to investigate the alleged table theft. Cf. *Guardian Automotive Trim, Inc.*, 340 NLRB 475, 475 fn. 1 (2003).[7] Instead, we find pretext based on the Respondent's failure to adequately explain why it targeted Martinez and not his teammates, who also served the table. Absent such an explanation, the Respondent has failed to establish by a preponderance of the evidence that it was in fact motivated by the alleged table theft when it temporarily demoted Martinez. Absent a nonpretextual justification for disciplining Martinez, the Respondent has not satisfied its rebuttal burden under *Wright Line*, 250 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), of demonstrating that it would have temporarily demoted Martinez even absent his protected activity. See *Bantek West*, *Inc.*, 344 NLRB No. 110, slip op. at 1 fn. 1, 8 (2005).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, KSL DC Management, LLC d/b/a Hotel del Coronado, Coronado, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[5] Chairman Battista notes that "any person" (not just the predecessor) could have filed a charge alleging that the neutrality agreement was unlawful. No charge was filed.

[6] Chairman Battista finds it unnecessary to decide whether a card-check recognition, based on a neutrality clause, would be binding on a successor employer.

Because the Board finds that the Respondent is procedurally barred from challenging the Union's certification, Member Schaumber finds it unnecessary to pass on the issues raised in the amicus brief.

[7] In finding that the Respondent violated the Act by temporarily demoting employee Martinez, Member Liebman relies on both the judge's analysis and her colleagues' analysis below.

Robert N. MacKay, Atty., for the General Counsel.
Matthew T. Wakefield and Candice T. Zee, Attys. (Ballard, Rosenberg, Golper, & Savitt, LLP), of Universal City, California, for the Respondent.
Brigitte Browning, Organizer, of San Diego, California,[1] for the Charging Party.

DECISION

STATEMENT OF THE CASE

LANA H. PARKE, Administrative Law Judge. This matter was tried in San Diego, California on July 19–21, 2004, on an order consolidating cases, consolidated complaint, and notice of hearing (the complaint) issued April 21, 2004,[2] by the Regional Director of Region 21 of the National Labor Relations Board (the Board) based on charges filed by the Hotel Employees and Restaurant Employees International Union, Local 30, AFL–CIO, CLC (the Union.)[3] The complaint, as amended, alleges KSL DC Management, LLC d/b/a Hotel del Coronado (Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Respondent essentially denied all allegations of unlawful conduct.

Issues

1. Did Respondent independently violate Section 8(a)(1) of the Act by threatening to report an employee to management for engaging in union or other protected activities, by threatening an employee with unspecified reprisals for engaging in union or other protected activities, by informing employees of the futility of selecting the Union as their bargaining representative, by telling an employee he needed to learn not to picket, by telling an employee he had been demoted so he would learn not to picket, by telling an employee he was being sent home so he would learn not to picket, by instructing a supervisor, in the presence of employees, to send home an employee because he engaged in union activities, or by indicating to an employee that he was disciplined because of his union or other protected activities.

2. Did Respondent temporarily demote, twice suspend, and discharge employee Joel Martinez because he engaged in concerted, protected activities to discourage other employees from doing likewise.

3. Did Respondent discharge employee Juan Torres because he engaged in union or other concerted protected activities and to discourage other employees from doing likewise.

4. Do the following classifications of employees constitute an appropriate unit within the meaning of Section 9(b) of the Act:

> All full time and regular part-time elevator operators, storeroom specialists, spa attendants and facilities employees employed by the Employer at its facility located at 1500 Orange Avenue, Coronado, California.

5. Since December 18, 2003, has the Union been the exclusive collective-bargaining representative of the above-described unit employees.

6. Has Respondent, since December 31, 2003, failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the above-described unit employees in violation of Section 8(a)(5) of the Act.

On the entire record,[4] including my observation of the demeanor of witnesses and after considering the briefs filed by the General Counsel, Respondent, and the amicus curiae brief of Charging Party/Petitioner, I make the following

FINDINGS OF FACTS

I. JURISDICTION

Since December 18, 2003, Respondent, a Delaware limited liability company, with a facility located in Coronado, California, has been engaged in the operation of a hotel providing food and lodging (the Hotel).[5] Based on a projection of its operations since December 18, 2003, Respondent will annually derive gross revenues in excess of $500,000 and will annually purchase and receive goods valued in excess of $50,000 at the hotel directly from points outside the State of California and from other enterprises located within the State of California, each of which will have received the goods directly from points outside the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Refusal to Recognize and Bargain

At relevant times prior to December 18, 2003, Destination Coronado Hotel, Inc., d/b/a Hotel del Coronado (Coronado) operated the Hotel. The Union and Coronado were parties to a collective-bargaining agreement for the term of September 1, 2000, through October 31, 2005, covering, inter alia, the Hotel's culinary, stewarding, dining, convention services, housekeeping, and banquet employees. On September 26, 2001, Coronado and the Union entered into a "neutrality agreement," which gave the Union, on written notice, access to the Hotel's unrepresented employees in nonwork areas during nonwork-

[1] W. James Young, Atty., of the National Right to Work Legal Defense Foundation, Inc., who represents David A. Hall, an employee of Respondent opposed to union organization, sought to intervene in these proceedings for the purpose of urging that a neutrality agreement entered into between Respondent's predecessor and the Union was improper. I denied the motion to intervene but granted permission to file an amicus curiae brief herein.

[2] All dates herein are 2004 unless otherwise specified.

[3] At the hearing, counsel for the General Counsel amended the complaint as follows: (1) alleged Eddie Jaramillo to be a banquet supervisor and a supervisor and agent of Respondent within the meaning of the Act, (2) alleged Respondent violated Sec. 8(a)(1) of the Act, through Eddie Ramirez, by informing employees of the futility of selecting the Union and (2) through Mark Braswell, by indicating to an employee that he was disciplined because of his protected activities. Respondent admitted the first allegation and denied the latter two.

[4] Respondent and Counsel for the General Counsel's unopposed posthearing motions to correct the transcript are granted. The motions and corrections are received as ALJ Exhs. 1 and 2, respectively.

[5] Where not otherwise noted, the findings are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

times and provided for streamlined representation election procedures if the Union obtained a showing of interest.

On October 6, 2003, after an organizing campaign conducted under the provisions of the neutrality agreement, the Union filed a representation petition with the Board for a unit of Respondent's employees employed at the Hotel in the following classifications (the unit):

> All full-time and regular part-time elevator operators, storeroom specialists, spa attendants and facilities employees employed by Respondent at its facility located at 1500 Orange Avenue, Coronado, California.

On October 9, 2003, the Union and Coronado entered into a Stipulation for Certification Upon Consent Election Agreement providing for a representation election in the unit on October 30, 2003, which agreement the Regional Director of Region 21 approved on October 10, 2003. The Union won the October 30, 2003 election, and the Region certified the Union as the exclusive collective-bargaining representative of employees in the unit on November 7, 2003.

On December 18, 2003, Respondent purchased the assets of Coronado. Respondent did not hire all of Coronado's employees and did not adopt the collective-bargaining agreement between the Union and Coronado but set its own initial terms and conditions of employment. By letter dated December 17, 2003, the Union demanded Respondent recognize it as the collective-bargaining representative of employees in more than 90 classifications, including those in the unit.

By letter dated December 31, 2003, Respondent recognized and offered to bargain with the Union as the collective-bargaining representative of two units of employees previously covered by the terms of the 2000 through 2005 collective-bargaining agreement between Coronado and the Union.[6] Respondent said nothing about recognizing or bargaining with the Union regarding the unit.

By letter to Respondent dated January 30, the Union sent a copy of the November 7, 2003 certification of representative of the unit and stated in pertinent part:

> please be advised that we represent the following classifications: Maintenance, Storeroom, Spa Attendants, and Elevator Operators (NLRB Certification attached).
>
> Your letter of December 31, 2003 failed to list these classifications as represented by the union. Please include [certain information] for these classifications also.

Respondent declined to recognize the Union as the representative of employees in the unit and has continued to refuse to do so since December 31, 2003, taking the position that the unit is inappropriate and that conduct by the Union and Coronado invalidated the October 30, 2003 representation election.

B. Alleged Independent 8(a)(1) Violations

At all relevant times, the following individuals were supervisors and agents of Respondent within the meaning of the Act in the following positions, which positions they had held when Coronado operated the Hotel:

Eddie Ramirez (Ramirez)	Banquet Manager
Toby Graff (Graff)	Banquet Manager[7]
Michael Holst (Holst)	Banquet Manager
Mark Braswell (Braswell)	Banquet Manager[8]
Matt Albert (Albert)	Banquet Manager
Eddie Jaramillo (Jaramillo)	Banquet Manager
Linda Contreras (Contreras)	Assistant Director Human Resources

Prior to Respondent's takeover, Brigitte Browning (Browning), organizer for the Union, prepared an employee petition (the employee petition), which was to be signed by the Hotel's employees and was intended to protest, inter alia, Respondent's failure to hire all of Coronado's employees. Browning gave copies of the petition to key employees, including Joel Martinez (Martinez), banquet server, for signature solicitation. Martinez collected employee signatures on the employee petition during the week of December 18, 2003.[9] According to employee Modesto Perez (Perez), one day, as Martinez discussed the employee petition with him at a table in the employee cafeteria, Ramirez stopped by them and looked at the petition, which lay on the table. Ramirez asked, "That is a union petition, right?" Saying he would tell Braswell so he could take action, Ramirez left. Ramirez denied ever seeing any petition or asking or commenting to any employee about one, and Braswell denied that Ramirez had ever told him of a petition. Because of inconsistency and vacillation in Ramirez' testimony, as set forth below, I do not credit his denial. I found Perez to be a forthright and reliable witness, and I find Ramirez made the statements Perez attributed to him.

The Union engaged in picketing and leafleting in front of the Hotel on December 18, 20, and 31, 2003, and January 19 in protest, inter alia, of Respondent's changes in terms of employment and refusal to hire all employees of Coronado. Some employees wore union buttons at work.

On about December 20, 2003, Ramirez walked past Joaquin Garcia (Garcia) in the banquet office, touched him on the shoulder and said, "Joaquin, no more union. Be careful."[10] Ramirez denied making any such statement. I found Garcia to be clear and careful in his testimony. I note he was employed at the Hotel at the time of the hearing, and, as a current employee, his testimony adverse to Respondent is given against self-interest, a factor not to be regarded lightly. Moreover, he evinced no animosity toward either the Company or his supervisors, and his manner and demeanor were convincing. I accept Garcia's accounts in this instance and in further testimony as set forth below.

[6] Respondent is currently in negotiations with the Union regarding the two units.

[7] Graft left Respondent's employ in February 2004.

[8] Braswell left Respondent's employ in February 2004.

[9] Respondent contends the failure of counsel for the General Counsel or the Charging Party to introduce any such petition into evidence shows Martinez was never involved in circulating the petition. It is not necessary, however, to see the petition to accept evidence of its existence and circulation.

[10] In his investigatory affidavit, Garcia recounted Ramirez' comment as follows: "You guys need to be careful because the Union isn't here anymore and that you guys can be fired for any mistake."

Perez testified that on December 25, 2003, during his shift, he overheard Jaramillo say to Graff as they worked at the micros (credit card) machine, "Send home the picket line guy." According to Perez, Jaramillo made the statement in English. Perez, whose primary language is Spanish and who testified through an interpreter, demonstrated his ability to comprehend English. Graff and Jaramillo denied any such interchange. I credit Perez' testimony.

Garcia missed work during the Christmas 2003 holidays because of illness. According to Garcia, on January 10, he explained to Ramirez that when, prior to the holidays, he had been unable to reach a supervisor, he had followed the procedure of a decade and had notified security of his prospective absence. Ramirez told Garcia he would have to talk to Braswell about whether Garcia had made proper notification, and if not, some action would be taken against him because a union contract no longer existed, and the company could fire him. Ramirez said it was easier to fire someone since there was no union. On other occasions when Garcia asked why he was being scheduled fewer days although he had seniority, Ramirez told him, "No seniority, no union." On three or four other occasions, Ramirez told employees there was no union, and they should be careful not to do the wrong thing. Respondent points out that Respondent had recognized the Union for two units of employees, including the one in which Garcia worked, and therefore, Garcia's testimony is inherently unreliable. I note Garcia testified Ramirez said the union contract no longer existed as well as saying there was no union, and I find it reasonable to infer that a declaration of "no union" was intended and was understood to mean no contract. I credit Garcia's testimony.

Garcia wore union buttons at work and engaged in picketing the Hotel on January 19. Two or 3 days later, Albert told Garcia, "You guys making too many [sic] noise outside. You guys better be careful because you know what happened with Jonathan [Juan Torres who was fired on January 14]." Albert denied making any such statement to Garcia. I credit Garcia's testimony.

C. Discharge of Juan Torres

Juan Torres (sometimes called "Jonathan" at the workplace and herein Torres), worked at the Hotel from 1986 until his discharge on January 14, as a barback, the duties of which are to prepare banquet bars for serving, i.e., assembling ice, glasses, beverages, etc. Respondent hired Torres when it purchased the Hotel. Torres' supervisors remained unchanged; his immediate supervisor after December 18, 2003 was Ramirez who reported to Braswell. Gabriel "Guinny" Zambrano (Zambrano) continued to serve as lead barback, the duties of which include posting work schedules and notifying employees of schedule changes.

Torres participated in picketing at the Hotel on December 18 and 20, 2003, during which time, he testified, he saw Ramirez and Graff watching the picketing from the second story window of the Grand Hall. Ramirez denied that he had seen any picketing at all at the Hotel until about two months prior to the hearing (sometime in May). Graff denied seeing Torres picketing. Ramirez' testimony that he never saw any picketing at the Hotel prior to May is so implausible that I cannot credit him. I find Respondent was aware Torres engaged in picketing the Hotel prior to his discharge.

Before Respondent's takeover of the Hotel, Coronado generated weekly work schedules for banquet employees. Banquet bartender and barback schedules were set out on a paper entitled "Banquet Server Weekly Schedule," a copy of which was available to each employee and also posted on Saturday afternoons. Each schedule covered the period of Monday through Sunday of each week and designated employee reporting time under columns marked "B, L, and D" for breakfast, lunch, and dinner, respectively. After December 18, 2003, Respondent changed the weekly work schedule period to begin on Saturday and end on Friday. Respondent posted a notice in several banquet office areas, which in pertinent part, read:

> *WORK WEEK SCHEDULE*
>
> Effective Immediately: 12/19/03
> Due to new company policies the new work schedule begins on *Saturday* and ends on *Friday*.

Torres worked Saturday, December 20, 2003 but did not see the posted notice of the changed schedule period. He obtained a copy of the barback schedule posted for Monday, December 22 through Sunday, December 28, 2003, of the following week. The schedule was blank for all employees for the days of December 27 and 28, 2003, and showed no work assignment for Torres at any time during that week. Respondent posted another schedule that reflected the changed scheduling period, Saturday, December 27, 2003 through January 2. The new schedule showed Torres scheduled as follows:

> December 27, 2003—9 a.m. to 5 p.m.
> December 31, 2003—4 p.m. to midnight

Torres did not see the changed schedule and did not report to work on December 27, 2003. No one from the Hotel contacted Torres to tell him of any change in the schedule or that he was scheduled to work on December 27, 2003.

According to Braswell, Ramirez came to him the night of December 27, 2003 and told him Torres had not shown up for work. Braswell told Ramirez to document it. Ramirez did not fully corroborate Braswell's testimony. Although Ramirez testified he told Braswell that Torres was a no-call/no-show that night, he testified Braswell made no response. A disciplinary action form was created for Torres, which Braswell said he signed and forwarded to human resources and which reads in pertinent part:

> Date written: 12–29–03
> Date of Incident: 12–27–03
> . . . .
> Incident Description: Juan was scheduled to work on 12–27–03. He did not call nor did he report to work as scheduled.
> . . . .
> Disciplinary action taken:
> . . . .
> Final Written Warning
> . . . .

> Has employee received any prior warnings of any kind? . . . Final Written Warning

Torres denied Respondent ever gave him the above disciplinary action form or that any supervisor ever spoke to him about missing the December 27 shift prior to his discharge, and there is no contrary evidence. According to Braswell, he was not involved in giving this written warning to Torres. When Ramirez was asked if he had given Torres the disciplinary action form for no-call/no-show on December 27, 2003, his answer was as follows:

> A. There was a time–if we are—when he showed up to work, he had already gotten the no-call/no-show. Mark was still—that paperwork and then, after that, he presented that. I believe he did that job abandonment. I am not sure when all that took action. After that job abandonment, I know that Mark was going to take action, over it.

Although it is unclear what Ramirez meant by this somewhat circumlocutory answer, it is obvious he did not give Torres the written warning. Further, Ramirez admitted he did not know if the written warning had been shown to Torres before January 14. Ramirez did testify, without further explication, that Torres "mentioned" to him he knew he was on schedule for December 27, 2003, but in light of the vague and inconsistent testimony regarding the warning, I cannot accept his assertion. I find, therefore, that Respondent neither gave Torres any warning, oral or written, for not coming to work on December 27, 2003, nor even mentioned the matter to him prior to his discharge.

On December 28, 2003, Torres telephoned the Hotel to learn his schedule for the following week. He spoke to barback Gustavo Hernandez, who said he was scheduled to work December 31, 2003, at 4 p.m.

On December 30, 2003, Torres went to the Hotel to talk to Ramirez. He told Ramirez he needed more hours, that he had not been scheduled for even 1 day. According to Torres, Ramirez told him Braswell prepared the schedule, and Torres went to Braswell with his complaint. Braswell told him Ramirez made the schedule. Ramirez entered Braswell's office at that moment, and Torres told him in Spanish what Braswell had said. Ramirez answered in Spanish that both of them made out the schedule. Torres asked why Respondent was not giving him any hours. Ramirez said he could do as he pleased, as there was no union and no seniority, and that what Torres was doing was not helping him; it was not the right thing, and he should not use the buttons. Torres showed Ramirez Respondent's Hotel Del Coronado associate handbook, which had been given to employees and which stated seniority could be taken into account in scheduling.[11] Ramirez agreed it could. Torres told Ramirez he was going to talk to personnel. Ramirez essentially denied any such conversation although he testified he told Torres work assignments were based on performance. Although Ramirez observed Torres wearing a union button "all the time," he denied he said anything to him about it. I did not find Ramirez' to be a convincing witness. I found Torres to be earnest and careful in testifying and apparently candid. I accept his testimony in this regard.

Respondent's barback schedule for the first Saturday through Friday period in January showed Torres assigned to work on Monday, January 5, 11 a.m. to 7 p.m. On Sunday, January 4, Zambrano telephoned Torres and told him to start work on the following day, Monday, January 5, at 9 a.m. instead of 11 a.m. As directed, Torres reported to work at 9 a.m. on January 5 and worked until 4:30 p.m. At 4:30 p.m., Zambrano said the employees for the evening shift were already there, and the earlier shift employees could leave. According to Torres, it was not unusual for Zambrano to give such directions. Torres' timecard shows he punched out at 4:30 p.m.[12]

Ramirez testified he had given Zambrano permission to leave early on January 5, but had given no such permission to Torres. According to Ramirez, he noticed Torres was gone at about 2:30 p.m.; he prepared a disciplinary action form for Torres and submitted it to Braswell.[13] Later, at Torres' next scheduled shift, Ramirez asked him about his absence. Torres told Ramirez that Zambrano had authorized his leaving early. According to Ramirez, he then asked Zambrano if he had authorized Torres to leave early, and Zambrano denied having done so. According to Ramirez, he told Braswell of Zambrano's response.

Braswell's testimony regarding Torres' leaving on January 5 was not fully consistent with that of Ramirez. Braswell testified Ramirez came to him on January 5 and told him, "Juan is gone." Braswell asked Ramirez to talk to Torres and find out what had happened. Ramirez "probably" reported back to him at Torres' next shift that Torres said Zambrano told him he could leave. Under cross-examination, Braswell testified Ramirez also told him Zambrano had admitted telling Torres he could leave early. The inconsistencies between Ramirez and Braswell's accounts further diminishes Ramirez' credibility.

Braswell assertedly found Torres' reason for leaving unacceptable. According to Braswell, sometime during the summer of 2003, a grievance resolution meeting between Coronado and the Union, attended by barbacks, including Torres, addressed Zambrano's authority to release employees from work early. Coronado and the Union agreed that Zambrano could release the barbacks for breaks but could not change employees' schedules, either to bring them in early or send them home early. Because of that background, Braswell concluded Torres left work without permission although he knew better. Braswell initially testified the grievance related to Torres' having left early. Under cross-examination, he was unsure whether the grievance concerned Torres. Graff testified the grievance was that of an employee named "Joaquin." The recollections of Braswell and Graff about the meeting were vague, and I con-

[11] The pertinent provision of the Associate Handbook reads:

> SENIORITY
>
> Classification seniority, which is the length of time an employee has held their current position . . . may be taken into consideration for purposes of scheduling.

[12] Having reported to work at 9 a.m., presumably Torres' shift would have ended at 5 p.m. or 30 minutes after he left work.

[13] Ramirez did not explain why he believed Torres was gone from work by 2:30 p.m. although Torres did not punch out until 4:30 p.m. I find this unexplained inconsistency a further reason to discredit Ramirez' testimony.

clude Braswell did not have a good-faith belief that the grievance related to Torres or even that he was present at the meeting.

Torres called in sick prior to his shift on Tuesday, January 6, and did not report to work again until January 10. When he did so, Ramirez gave him a written warning for having started and left work early on January 5. Torres protested that Zambrano had called him in early and had told him to leave early. Ramirez said that Zambrano could call Torres in early but had no authority to let him leave early. Torres denied he had ever before been told Zambrano had no authority to send him home early.

About a week later, after a discussion with Contreras and considering Torres' past performance issues, his no-call/no-show of December 27, and that he was still in his 90-day probation period, Braswell recommended Torres be terminated. Braswell denied any knowledge of Torres' involvement in union activities. Given Ramirez' observation that Torres wore a union button all the time, I cannot accept Braswell's denial of knowledge.

During Torres' scheduled shift on January 14, Ramirez called him to the banquet office and, with Holst present, fired him. Ramirez told Torres that Respondent no longer needed his services because he had not reported to work on two days and because he had left work early on January 5. When Torres asked what days he had missed, Ramirez did not answer. Torres told Ramirez what he was saying was untrue. He refused to sign the termination notice, which read, "Juan left work one hour early without informing his manager. Juan is aware he must have manager's authorization to leave his scheduled shift early." The notice further noted a prior warning for "No call no show on 12/27/04 [sic]."

According to Braswell, Respondent terminated Torres because he was no-call/no-show for a shift, left work early without permission, and had serious performance issues beginning prior to December 18, 2003. When asked to specify the issues, Braswell testified as follows:

> A. Just recall some—a big—Juan, also, had—would leave work early, in the past—has left work early, that type of thing, disappeared. We could not find him.
>
> . . . .
>
> Q. Were you relying on his performance before December 18th or after December 18th?
>
> A. It would be after, again. He would continue the same—the same—

Specifically, Braswell recalled that on New Year's Eve, he and Ramirez tried unsuccessfully to reach Torres by radio during his shift when work was "real busy." Braswell helped Ramirez look for Torres because he was "responsible for the Department." Braswell and Ramirez found Torres talking to a bartender. When asked if he had said anything to Torres, Braswell testified:

> A. I let—Eddie [Ramirez] was with me and I let Eddie handle that.
>
> Q. And did Eddie say something to him?
>
> A. Yeah. He told him to get back to work—I did not hear him say that. So, I cannot really say. I am assuming that is what he told him because he answered the radio, from that point on.

Ramirez recounted an occasion on either Christmas or New Year when he looked for Torres who had been told to get wine buckets. While Ramirez said he found Torres talking to a bartender, he did not otherwise corroborate Braswell's account of hunting for a nonresponsive Torres. Ramirez said nothing about Braswell's participation in looking for Torres, and he testified Torres did, in fact, respond to Ramirez' radio calls with "10/4," meaning he would take care of the needed wine buckets. Further, according to Ramirez, upon finding Torres, he only said to the employee, "We have been waiting for the wine buckets." According to Ramirez, Torres pointed to another employee who was approaching with a cart of wine buckets. Ramirez did not, by his own account, dispute Torres' explanation that he had been doing something else but only reproached him for not calling if he needed help. Respondent issued no written discipline to Torres for dereliction of duty on New Year's Eve or any other time, and Braswell admitted Torres' work performance was no different after the December 18 takeover than it had been prior thereto. On cross-examination, Ramirez initially testified Torres was the third worst barback he supervised and later testified he was the worst. Given Braswell and Ramirez' vague and inconsistent testimony regarding Torres' poor work performance or malingering, I conclude Respondent had no good faith complaint about Torres' work.

In spite of the assertedly well-known decree regarding Zambrano's lack of authority to release employees early, Braswell did not consider Zambrano's conduct to be an infraction of Respondent's rules. Respondent did not address Zambrano's role in Torres' leaving work early until March 19, more than two months after Torres' discharge, at which time Respondent issued Zambrano a written warning, signed inter alia by Ramirez, with the following incident description:

> Management recently had knowledge that Guinny altered both his and another associate schedule without the approval of a banquet manager. He and the other associate swiped in and out earlier than their original scheduled time. This was not authorized by a banquet manager. Any changes to a schedule must always be approved by a banquet manager.

D. Discharge of Joel Martinez

Martinez worked at the Hotel from 1989 until his discharge on January 22. For the last 5 years of his employment, he worked as a banquet server. In that position, both before and after December 18, 2003, his supervisors were Braswell, Graff, Holst, and Jaramillo.

On December 14, 2003, Martinez collected signatures on the employee petition during his lunchbreak in the employee cafeteria. According to Martinez, as he held the employee petition and asked coworkers to sign it, Graff approached and stared at him. Graff shook his head in a gesture of disapproval but said nothing. Martinez put the petition away. Graff denied ever seeing Martinez circulate a petition or indicating disapproval of it. I found Martinez to be generally a forthright and sincere

witness with a good recall and direct manner.[14] For reasons set forth below, I found Graff's testimony to be sometimes equivocal and/or inconsistent. Therefore, I credit Martinez' account of this incident.

On the same day, December 14, 2003, Martinez was assigned to serve seven to eight tables at the Crown Room buffet as a member of a team that also included server, Florence Hatfield (Hatfield)[15] and dining room attendant (also called busboy or DRA, and herein called DRA) Zeferino Cortez (Cortez). During the shift, host Antony Castillo assigned Martinez' team to serve at a big table in the Coronet room that accommodated large parties. Martinez testified Hatfield and Cortez served the large table; Martinez only presented the bill. Later that day, Graff called him to a storage area and told him he was suspended for the next Sunday brunch because he had "stolen" a table from a coworker and also because he had been collecting signatures that morning. (A server steals a table when he/she serves at an unassigned table, thereby obtaining the table's tip.) Martinez denied having stolen any table. Graff testified that server, Don Smith, complained to him of Martinez' stealing one of his tables. Graff observed Martinez working the table pointed out by Don Smith and then went and spoke with Braswell about the situation. Graff testified that he investigated the accusation before going to Braswell, but I cannot accept his testimony. Under cross-examination, Graff initially testified he knew the subject table was Smith's and not Martinez' essentially because Smith, whom he respected, had told him so. When questioned if he had asked Armando, the seating host, whether he had assigned the table to Smith or to Martinez, Graff first answered, "No," then contradicting himself, testified, "I asked. I never question Armando's decision but I did ask Armando, was it Don's? He goes, yes." Because of his initial failure to mention any inquiry of Armando and his manner and demeanor in later claiming to have done so, I find Graff made no genuine investigation before taking the table-stealing complaint to Braswell.

According to Braswell, upon receiving Graff's report of table-stealing, he instructed Graff to assign Martinez as a DRA for three public dining shifts (since DRAs did not work banquets) to let him address his performance problems.[16] Braswell said demotion to DRA was a common disciplinary practice at the Hotel for performance problems. Graff testified he told Martinez he would be assigned as a DRA for the next three public dining shifts, which would have been the Sunday brunch on December 21, 2003, the Christmas Eve holiday event on December 24, 2003, and the Christmas holiday event on December 25, 2003. I cannot accept Braswell or Graff's accounts. I note Respondent failed to investigate the allegation of table-stealing and jumped directly to discipline with inexplicable haste. Respondent also failed to present any corroborating employee witness to the table-stealing incident or explain its failure to do so. Further, although Braswell claimed Martinez had stolen tables on several occasions in the past, the last occurring in October or November 2003, there is no evidence Martinez was ever disciplined for doing so; Martinez testified without contradiction that he had never, before December 2003, been demoted to DRA. I accept, therefore, Martinez' version of his interchange with Graff, although as noted below, Martinez was not suspended for the following Sunday brunch.

On an afternoon in the latter part of December 2003, probably December 20,[17] Martinez again collected signatures on the employee petition in the cafeteria. Ramirez who was walking across the cafeteria stopped next to Martinez as he was asking coworkers to sign and said, "You guys collecting signatures for the union, right?" The employees did not answer, and Ramirez said that he would tell Braswell and Jaramillo, who were supervising that day. Martinez put the petition away for the rest of the day. Later, Martinez joined the union picket line from which he observed Graff and Jaramillo at a smoking area outside the main kitchen. As Martinez passed in front of them, both shook their heads in gestures of disapproval. Jaramillo denied ever seeing Martinez picketing. Martinez worked as a server that night without incident. I credit Martinez' account of the incidents.

There is testimonial confusion regarding whether Martinez worked on December 21, 2003. Martinez testified he did not work, maintaining he was suspended on that date, but Respondent's records show the following for Martinez' work hours of December 20 through 25, 2003:

DATE	CLOCK IN	CLOCK OUT	POSITION CODE
Dec. 20	3 p.m.	11 p.m.	855 (server)
Dec. 21	7 p.m.	3:30 p.m.	198 (DRA)
Dec. 24	3 p.m.	10:15 p.m.	855
Dec. 25	8:30 a.m.	10:06 a.m.	855
	10:36 a.m.	Noon	198[18]

I find Martinez worked the Sunday brunch on December 21, 2003, as a DRA.[19] According to Martinez, when he arrived at work, Graff said he was to work as a DRA. Martinez, who had not worked as a DRA for 5 years, asked why, and Graff said, "You have to learn not to picket."[20] Although Martinez testified this exchange occurred on December 24, 2003, since Respondent's records show Martinez worked on that date as a server, the recounted exchange with Graff could not have occurred then. It is reasonable to infer that Martinez may have confused what occurred on December 24, 2003, with what oc-

[14] Although this incident occurred prior to Respondent's purchase of the Hotel assets and is not attributable to Respondent, since Respondent employed Graff as a supervisor, it may serve to demonstrate animus.

[15] In his testimony, Braswell referred to an employee named Florence "Henderson," but the record suggests Florence Hatfield and Florence Henderson are one and the same. I have referred to that employee as Hatfield herein.

[16] Banquet servers worked during banquets and public dining events, the latter of which are Sunday brunch and holiday buffets.

[17] Although Martinez testified this incident occurred on December 18, 2003, his time card shows he was mistaken. Respondent argues that Martinez' mistake about the date proves he did not picket, but it is reasonable to infer Martinez merely confused the date.

[18] No explanation was given as to why this apparently inaccurate code appears on Martinez' timecard for this time and date.

[19] As a DRA, Martinez assisted servers and received only 15 percent of the tip pool, the remaining going to the servers.

[20] Under cross-examination, Martinez added that Graff also said his demotion was for collecting signatures.

curred on December 21, 2003. I do not find his confusion with dates affects his credibility.

Martinez was scheduled to work as a server in the ballroom on December 25, 2003 and arrived at work at about 10 a.m. After Martinez worked as a server for about 1-1/2 hours in the ballroom, Jaramillo sent him and his serving partner, Adam Nichols (Nichols), to the Crown Room, which opened at noon, saying Graff needed servers there. According to Graff, "I had a station I had to expand. I had one huge station but with two people. It was a monster station . . . so, I took that station and made it reasonable, and that was the station [Nichols and Martinez] got."

When Martinez reported to the Crown Room a few minutes before noon, Graff assigned him and Nichols to a station of five tables while other servers were assigned more. Nichols asked Graff if the small station was meant as a punishment. Although Martinez was not happy about the assignment, he did not complain.

According to Graff, he went to Martinez and apologized for the smallness of his assigned station. Graff testified he knew Martinez was upset about the station because he "gave a hand gesture, like what is this?" Graff testified Martinez said he would rather go home. Graff ascertained from Nichols that he could handle the station by himself and then spoke to Braswell, telling him he intended to give Martinez a choice of staying or leaving. Braswell said he had no problem with that. Graff wanted to have someone with him when he talked to Martinez because he believed Martinez was angry about the situation. Taking Martina Ewing, banquet manager, with him, Graff approached Martinez and told him Nichols could handle the station, and if Martinez liked he could go home. Martinez shook Graff's hand and thanked him. Graff told him to enjoy his Christmas with his family, and Martinez clocked out. Martina Ewing, called as a witness, did not recall any such conversation, although she testified she would have recalled a situation in which a supervisor suspended an employee and ordered him to go home.

Martinez' testimony differed from Graff's. According to Martinez, at about 12:30 p.m., Graff led Martinez' to the [time clock] and said, "Check out, go home, Merry Christmas." On direct examination, Martinez testified he asked why he was being sent home, and Graff said, "You got to learn the lesson not to be on the picket line." Under cross-examination, Martinez recounted his December 25 exchange with Graff somewhat differently:

> Q. BY WAKEFIELD: As best as you can recall, what was it that Toby said to you, at the time you left?
>
> A. Check out, go home, Merry Christmas and I asked him why? He said, go home, Merry Christmas.

With regard to the interchange between Martinez and Graff on December 25, 2003, there are factors that weigh against the credibility of both participants. Martinez' direct and cross-examination versions of Graff's statements are inconsistent, and I find that troubling. Graff's account suffers from inherent incongruity. His testimony that he believed Martinez was angry at the smallness of the station he was assigned in the Crown Room is implausible. From Graff's description, Martinez' hand gesture could not have produced any rational belief that Martinez was angry. Indeed, according to Graff, Nichols was far more open than Martinez about his displeasure, asking if the assignment was a punishment, and yet Graff did not, apparently, conclude he was angry. Graff claimed Martinez said he would rather go home than work the shift, and yet when Graff approached him to tell him he could do just that, Graff assertedly felt the need to take another manager (who, incidentally recalls no such event) to beard the allegedly angry Martinez. Further, Graff's assertion that Respondent did not need Martinez' services that day is inconsistent with his testimony that holiday dining events were "a lot of work," and "crazy," "revolving door" occasions, when Braswell did not send any employee home.[21] All circumstances considered, I conclude Martinez' failure to repeat fully in cross-examination what he had testified to in direct, does not vitiate his direct testimony. I find the inconsistency is more likely the product of nerves than of mendacity. Further, I found Graff's testimony to be unreliable and his manner and demeanor unprepossessing. Accordingly, I give weight to Martinez' direct testimony.

Friday, January 2, was Respondent's biweekly payday. Martinez, who was not scheduled to work, went in to pick up his paycheck. Seeing Holst, Martinez asked him why he was not being given work although he was available morning, noon, and night. Holst said, "You have to learn the lesson to not to be in the picket line." Holst recalled the conversation but denied he said anything about the picket line. Rather, he said he told Martinez that Respondent assigned full-time shifts based on performance. Holst denied knowing Martinez had picketed. I accept Martinez' testimony.

On January 9, Martinez reported for work at about 8:20 a.m., not knowing the 9:30 a.m. event for which he was scheduled had been canceled. According to Martinez, after he had changed into his uniform, secretary Rosemary Castillo (Castillo) told him the event had been canceled, that she had been unable to reach him by telephone to tell him, but that there was a chance the hotel might need servers for the afternoon or evening. Castillo testified she told Martinez it was a good thing he had shown up because the Hotel was going to use him to do side duty work. According to both Jaramillo and Castillo, Jaramillo told Martinez he was to roll silverware into napkins (rollups). In his direct testimony, Martinez denied anyone had told him there was work for him to do on January 9 or that Jaramillo had told him to roll silverware. Under cross-examination, however, Martinez said it was possible he had later admitted to Braswell that he had been told to do rollups. I find Jaramillo did, in fact, tell Martinez he was to perform side work that morning.

After Martinez learned the event had been canceled, he went to human resources and talked to Contreras about his concern that his supervisors wanted to fire him. According to Martinez, he did not tell Contreras about supervisor statements to him concerning his picketing or signature collection because he feared she would report the accusations to Braswell, and he

[21] The General Counsel points out that many servers worked overtime that day, but, as Respondent counters, that relates to how long the brunch ran that day and not to whether more servers were needed.

would be fired on the spot. Although he sought her help, Martinez felt the less he told human resources the better, as there was no union protection. Contreras testified that Martinez told her Graff had falsely accused him of stealing tables and that union steward, Michael Donaldson (Donaldson) had told him to be careful because management was out to fire him. Contreras reported the conversation to Braswell, who was shocked about Donaldson's reported statement.

After talking to Contreras, Martinez changed back into his street clothes and instead of going to the banquet office to do silverware roll ups, left the hotel. On his way to the parking lot, he passed by Graff, Jaramillo, and Holst in the smoking area. According to Martinez, he neither spoke to them nor they to him. According to Holst, Graff, and Jaramillo, Martinez appeared to be trying to avoid their notice and ignored them when they called to him.

Braswell testified that Holst reported Martinez' leaving on January 9, and after contacting other managers, Braswell discovered no one had authorized Martinez to leave work. Thereafter, Braswell "wanted to meet with the managers that saw [Martinez] leaving and ask what they saw and have them give me something in writing, as to what they had seen."

Martinez worked on January 10 and 11. On January 12, Castillo telephoned Martinez to ask if he could work a shift that day, which he was unable to do. During that time, no manager said anything to him about his having left work on January 9.

On January 12, Holst emailed a statement regarding the events of January 9 to Graff, Jaramillo, and Ramirez, with a copy to Braswell. The email read, in pertinent part, as follows:

> Subject: Joel Martinez
>
> The following is my statement of what took place on January 8th and 9th of 2004.
>
> . . . .
>
> On Friday, the 9th, Joel showed up for the 9:30 am cancelled shift. Eddie Jaramillo informed Joel of the cancelled function and that he needed to stay and roll silverware for a function later that night. Joel then went to the cafeteria.
>
> Around 10:00 am Toby Graff, Eddie Jaramillo, and myself were outside by the "high-noon" smoking area. I noticed Joel and Alfredo Gonzalez walking out from the employee entrance. When I looked again it was just Alfredo walking by himself. I then noticed Joel walking behind the convention services tents, cutting through to his vehicle. Eddie Jaramillo and I both tried to get Joel's attention from across the parking lot. When we asked Joel where he was going, Joel stopped from getting in the vehicle and looked over at us, then proceeded to climb into his vehicle and left for the day.

Holst emailed his statement a second time to Jaramillo on Wednesday, January 14,[22] and about 20 minutes later, Jaramillo emailed his statement to Braswell, which read as follows:

> On 1–9–04 Joel showed up to the office for his 10 am shift. I reminded him that due to the cancellation of the event, we had called and cancelled a lot of the associates but we need to help do 302 roll-ups for an evening event. Rosmary [sic] was also in the office and she also told Joel what he was doing that day. Joel disappeared for about 40 minutes so we thought he was down in the cafeteria waiting for his 10 am shift. Michael, Toby and myself were outside near the tent, when Michael saw Alfredo Gonzales coming out threw [sic] security with Joel Martinez. When Joel saw Mike he stopped and walked threw [sic] the backside of the tent where he proceeded to go to his car. Mike called for him and that's when Joel looked at Mike and got into his car and went home.

Graff, Jaramillo, and Holst testified in essential conformity to the information contained in the emailed statements. Martinez testified he walked by the supervisors as he left the Hotel on January 9, but they said nothing to him and he said nothing to them. Because, as noted above, I have reservations about the credibility of these supervisors and because of what appears to be Holst and Jaramillo's orchestration of evidence regarding Martinez' leaving the Hotel, I accept Martinez' testimony.

On the next payday, January 16, Martinez went to the hotel to get his paycheck and to check his schedule. While at the hotel, he asked to talk to Braswell, as he wanted to find out why he was not being scheduled while others were working 5 to 6 days a week. Braswell took Martinez to his office where Graff was also present. According to Martinez, Braswell told Martinez to sit down and held up three papers, telling him he had three warnings: he had not shown up for work on January 9 and 11. Martinez said he had worked on January 11, and he reminded Braswell that they had made the dessert table together, to which Braswell agreed. Martinez said the event on January 9 had been canceled. Braswell told Martinez that although the event had been canceled, Martinez had been told to stay and do silverware rollups, but he had left without doing them. I accept Martinez' account.

According to Braswell, he also asked Martinez whether Donaldson had told Martinez to watch out because Respondent was trying to get rid of him.[23] Braswell said Martinez denied ever making such an accusation to Contreras.

Braswell told Martinez that every employee at the Hotel had a brand new slate, that all disciplinary documentation from the previous owner was gone, that he was very disappointed in Martinez, and that he had not expected [such conduct] from him. Braswell said the matter was a serious problem, and he was going to suspend Martinez for 3 days. According to Martinez, he asked Graff to leave so he could talk to Braswell alone to make things clear.[24] When Graff left the room, Martinez asked Braswell to consider his family situation: a wife and four children, and his 15-year work history with the Hotel. Braswell

[22] Holst testified he did not know why he twice emailed his statement to Jaramillo, that maybe it was because Jaramillo did not know how to put together a statement. I find it is reasonable to infer that Holst wanted to ensure his and Jaramillo's statements matched.

[23] Braswell testified that after Contreras reported to him what Martinez' had said about Donaldson, Braswell had asked Donaldson about the alleged conversation, and Donaldson had denied making such a statement.

[24] Graff denied Martinez asked him to leave or that he did so. I accept Martinez' testimony.

told Martinez he would have time to think about what he was doing and to learn not to be on the picket line. Braswell denied making such a statement and denied knowing Martinez had picketed, saying he had encouraged the staff to picket prior to Respondent's takeover, as he was not in favor of the change. Assuming Braswell encouraged employees to picket before the takeover, by December 18, 2003, Braswell had accepted employment with Respondent, and it is reasonable to assume he did not then view picketing so benignly. After considering the testimony as a whole as well as manner and demeanor of the witnesses, I credit Martinez' account.

Braswell gave Martinez a disciplinary action form dated January 14, which stated, "On Friday, 01/09/04, Joel Martinez abandoned his job by leaving without consent and without completing his duties assigned by management." The form stated Martinez was suspended from January 17–22 with a recommendation for termination. The form indicated no "prior warnings of any kind" and noted that Martinez should call human resources on January 22. Martinez, feeling pressured and humiliated, signed the form without looking at it.

On January 22, Martinez returned to the hotel. He showed the disciplinary action form he had received on January 16 to Contreras in human resources. She said she was sorry, but he was fired. Martinez protested the unfairness of Respondent's action and offered to take a lie detector test to show his supervisors were lying. Contreras said she would talk to her supervisor about it. Martinez heard nothing further from Respondent about his discharge.

At the hearing, Respondent offered evidence of numerous problems with Martinez' work prior to his discharge. According to Braswell, Martinez had a proclivity for stealing tables, one instance of which Braswell observed sometime in the latter part of 2003. Braswell also thought Martinez did not address his tables quickly enough. Further, there were several occasions when Martinez disappeared during his shift,[25] and a couple of occasions when Martinez untruthfully told Braswell he had permission to be away from his assigned banquet room. Graff testified that Martinez was the object of frequent table-stealing complaints from other servers and that no one liked to work with him because he was rude and uncooperative. Hatfield, according to Graff, was a server who complained about Martinez. I cannot accept Braswell or Graff's testimony in this regard. Braswell's description of Martinez as a problem employee is inconsistent with his having told Martinez at the January 16 discipline meeting that he was very disappointed in him, and he had not expected misconduct from him. Had Martinez, in fact, had such a troubled work history, Braswell would have been neither surprised nor disappointed.

Moreover, it is unlikely Respondent would have hired him.[26] As for Graff's testimony, it is likewise inconsistent with the facts. Graff claimed frequent table-stealing complaints were leveled at Martinez, but Respondent does not point out any previous counseling or discipline, including DRA duty, meted to Martinez. Hatfield, named by both Braswell and Graff as a corroborating source, did not testify.

E. Discipline of Other Employees

Disciplinary action forms received into evidence show Respondent issued discipline to banquet department employees during the relevant period as follows:

[25] In following testimony, Braswell said Martinez "would inevitably disappear" during banquet team assignments and named Hatfield as an employee who reported Martinez' absence.

[26] Although Braswell claimed to have had no input into Respondent's employee selection, it is inconceivable that Respondent, which did not hire all employees, would have hired blindly.

INITIALS OF EMPLOYEE	DATE AND TYPE OF DISCIPLINE	INCIDENT DESCRIPTION	CORRECTIVE ACTION EXPECTED
JDE	1/17/04 written warning[27]	On 1/17/04 [JDE] was scheduled to work at 10 am. He no called or showed.	Call 2 hours prior to the scheduled shift.
KP	1/20/04 written warning	No Call/No Show on 1/19/04	
MM	3/28/04 written warning	M. was out of his work area from 9:10–9:55. He did not have permission nor did he request to leave.	Inform manager when leaving the work area.
EC	1/22/04 verbal warning	E was assigned to set a coffee break along with another associate. The break included 3 urns and condiments, as well as to go cups. All equipment was there in a timely manner and the break took 2 hours to set. E should understand that assignments should be carried out in an efficient and timely manner. This created a hardship on remaining staff who were setting a lunch for 550 people.	
ED	12/29/03 final written warning[28]	E was scheduled to work on 12-27-03. E did not call nor report to work as scheduled.	Must call in 2 hours prior to scheduled shift if unable to work
RD	12/29/03 final written warning	R was scheduled to work on 12-28-03. R did not call nor report to work as scheduled.	Must call in 2 hours prior to scheduled shift if unable to work

[27] JDE also failed to call or show on January 18 and 19, and Respondent terminated him.

[28] When ED was a no-call/no-show for the following day, December 28, 2003, Respondent terminated him.

SAL	2/05/04 final written warning	S no called/no showed for scheduled shift on Thursday 2-05-04 at 4:30 p.m.	
AC	12/24/03 suspended, recommended for termination	A left the work place and did not return. A walked off the job on 12/24 without notifying Manager.[29]	
CV	1/27/03 suspension	. . . was not able to complete shift and refused the instructions from Security and walked off the job on 1/26 . . . suspended pending investigation.[30]	

[29] AC had no prior warnings. It may be that AC self-terminated. Contreras testified that AC was no longer working at the Hotel because "[h]e walked off the job."

[30] Respondent later terminated CV.

III. DISCUSSION

A. Refusal to Recognize and Bargain

Respondent does not dispute that it is a successor to Coronado within the auspices of *NLRB v. Burns Security Services,* 406 U.S. 272 (1972). In its answer to the complaint, however, Respondent denied the appropriateness of the unit, and in its posthearing brief, Respondent argued that an unlawful neutrality agreement and ensuing misconduct by the Union and Coronado led to the certification of an inappropriate "fictional" unit. David A. Hall, in his amicus curiae brief, argues that neutrality agreements are "bargaining to organize" schemes, in which employers agree to assist union organizing drives in exchange for favorable union treatment. Such, he argues, constitutes improper encouragement of union membership.

At the hearing, Respondent sought to introduce evidence that the Stipulation for Certification Upon Consent Election Agreement entered into by the Union and Coronado on October 9, 2003, was, essentially, an unlawfully contrived accord, owing its existence to the parties' adherence to an unlawful neutrality agreement. Respondent also sought to adduce evidence to support its argument that the November 7, 2003 certification of representation of employees should not be given effect, and that the unit is an inappropriate grouping of employees for purposes of collective bargaining. Respondent presented a comprehensive offer of proof.

In ruling on Respondent's offer of proof, I have considered that the Board encourages voluntary union recognition as a fundamental element of national labor policy. *Dana Corp.,* 341 NLRB 1283, 1285–1286 (2004). The Board "seeks to balance the competing goals of effectuating free choice while promoting voluntary recognition and protecting the stability of collective-bargaining relationships." *Ford Center for the Performing Arts*, 328 NLRB 1 (1999). Moreover, the Board does not find neutrality agreements between employers and unions, per se, violate the Act. There is nothing in the neutrality agreement herein to suggest that Coronado agreed to union organizational tactics or procedures that in any way interfered with employees' free choice. Further, there is nothing in Respondent's offer of proof to show the likely existence of any evidence of fraud or collusion in either the negotiation of the neutrality agreement or the agreement to a consent election. Respondent's offer of proof does not allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. Since Respondent's offer of proof failed to raise any representation issue properly litigable in this unfair labor practice proceeding, I rejected Respondent's offer of proof and declined to receive any testimony regarding the propriety of the neutrality agreement or the consent election agreement.

As to the appropriateness of the unit, the Board refuses to allow relitigation of unit appropriateness where the intent behind the parties' unit stipulation is clear and unambiguous even if the stipulated result differs from that which the Board would reach. *South Coast Hospice,* 333 NLRB 198 (2001); *Hampton Inn Suites,* 331 NLRB 238, 239 (2000); *Otis Hospital,* 219 NLRB 164, 165 (1975). As stated by the Board, "The initial question is 'whether the intent of the parties is unambiguously manifested in the unit stipulation.'" *Southwest Gas Corp.,* 305 NLRB 542 fn. 6 (1991). If the objective intent of the parties is manifested, the Board gives effect to the agreement. [Citations omitted.]" *G & K Services,* 340 NLRB 921, 922 (2003). See also *Genesis Health Ventures of West Virginia, L.P.,* 326 NLRB 1208 (1998) ("Where the parties' intent is clear and does not contravene any statutory provision or Board policy, the Board holds the parties to their agreement. [Citation omitted]"); *Laidlaw Transit, Inc.,* 322 NLRB 895 (1997) (the Board will not examine extrinsic evidence to determine parties' intent if the unit description is in clear and unambiguous terms).

Here, no ambiguity exists in the unit description, and the certification of representative is proper. Accordingly, as of November 7, 2003, the Union was the certified collective-bargaining representative of Coronado's employees in the unit. Where, as here, Respondent, the successor employer, made a conscious decision to maintain generally the same business and to hire a majority of its employees from Coronado's work force, Respondent is obliged under Section 8(a)(5) of the Act to recognize and bargain with the collective-bargaining representative of Coronado's employees in the unit. Accordingly, I find Respondent violated Section 8(a)(5) of the Act by its refusal to recognize and bargain with the Union as the collective-bargaining representative of its employees in the unit.

B. Independent Violations of Section 8(a)(1) of the Act

Section 8(a)(1) of the Act provides that "It shall be an unfair labor practice for an employer . . . to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." In considering communications from an employer to employees, the Board applies the "objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Miller Electric Pump & Plumbing,* 334 NLRB 824 (2001). Communications from an employer to employees that threaten reprisal for supporting a labor organization interfere with, restrain, or coerce employees as contemplated by Section 8(a)(1). *Manhattan Crowne Plaza Town Park Hotel Corp.,* 341 NLRB

619 (2004); *Grouse Mountain Lodge*, 333 NLRB 1322 fn. 2 (2001). The Board has also found violations of Section 8(a)(1) by an employer's disparaging or undermining the union or its representatives. *Prudential Insurance Co. of America*, 317 NLRB 357 (1995); *Oster Specialty Products*, 315 NLRB 67 (1994). Employers, likewise, may violate Section 8(a)(1) by stating that an employee was disciplined or terminated for engaging in protected activities. *Baker Electric*, 317 NLRB 835 (1995). Further, "an employer violates Section 8(a)(1) of the Act if its conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights. *Unbelievable, Inc.,* 323 NLRB 815, 816 (1997).

By the following conduct, the following supervisors of Respondent interfered with, restrained, and/or coerced employees in violation of Section 8(a)(1) of the Act:

Eddie Ramirez

On December 18, 2003, Ramirez threatened to report Martinez and coworkers to management because they were collecting signatures on an employee petition. Such is an implied threat of retaliation for engaging in protected activity.

On December 20, 2003, Ramirez told Garcia, "Joaquin, no more union. Be careful." On December 30, 2003, Ramirez told Torres he could schedule him as he pleased, as there was neither union nor seniority. On January 10, Ramirez told Garcia the same thing. On other occasions, Ramirez told other employees there was no union, and they should be careful not to do the wrong thing. In fact, there was a union on the scene; Respondent had recognized the Union as the representative of its banquet department and other employees. Ramirez' statement could only have been intended to portray the union as weak or ineffectual and to make clear that the employer alone was in control. The statements further signaled an intention to ignore the role of the Union as the representative of its employees and thereby warned employees of the futility of supporting the Union. Such communications restrain employees in the exercise of their right to support a union.

In the hearing of Perez, Ramirez told Jaramillo to "send home the picket line guy." The statement could reasonably be expected to create in the employee's mind a belief that another employee was being sent home because of his union activity. It is irrelevant that the supervisors may not have intended any employee to overhear the conversation. *Corporate Interiors, Inc.*, 340 NLRB 732, 732–733 (2003).

On December 30, 2003, Ramirez told Torres what he was doing was not helping him, and he should not use the [union] buttons. The statement, especially when made in conjunction with a discussion of why Torres was not being scheduled for work, is an implied threat of retaliation for the protected activity of wearing union buttons. *Ark Las Vegas Restaurant,* 335 NLRB 1284 fn. 1 (2001).

Toby Graff

On December 21, 2003, Graff told Martinez he was being temporarily demoted to DRA to teach him not to picket. On December 25, 2003, Graff told Martinez he was sending him home from work early to teach him not to picket. Informing an employee that employment action has been taken for unlawful reasons is coercive.

Matt Albert

On January 19, Albert told Garcia that picketing employees were "making too many [sic] noise outside," and warned, "You guys better be careful because you know what happened with Jonathan." The warning could only have referred to Torres, commonly known among employees as "Jonathan," whom Respondent had recently fired on January 14. The statement constituted a none-too-subtle threat of retaliatory discharge of employees who engaged in picketing.[31]

Michael Holst

On January 2, Holst told Martinez that he was not being scheduled because he needed to learn not to picket.

Mark Braswell

On January 16, Braswell told Martinez that during his period of discipline, he would have time to think about what he was doing and learn not to picket. Braswell's statement clearly linked the imposed discipline to Martinez' protected activities and violates Section 8(a)(1) of the Act.

C. Violations of Section 8(a)(3) of the Act

The complaint alleges that Respondent violated the Section 8(a)(3) of the Act by the following conduct:

1. On December 21, 2003, temporarily demoting Martinez.
2. On December 25, 2003, suspending Martinez for the remainder of his shift.
3. On January 14, discharging Torres.
4. On January 16, suspending Martinez pending termination.
5. On January 22, discharging Martinez.

In each of the above actions, the pivotal question is whether unlawful consideration of the employees' union activities prompted Respondent to impose the discipline. For questions of motivation in employer discipline, the Board has set up analytical guidelines. Under the Board's decision in *Wright Line*,[32] if the General Counsel's evidence supports a reasonable inference that protected concerted activity was a catalyzing factor in Respondent's actions, the General Counsel has made an initial showing of unlawful conduct.[33] The burden of proof then shifts to Respondent to establish persuasively by a preponderance[34] of the evidence that it would have made the same decision, even in the absence of union activity. *Avondale Industries, Inc.,* 329

[31] At the hearing, Respondent moved to dismiss par. 16(a) of the complaint as no evidence was adduced that Albert unlawfully informed employees the Union was no longer at the Hotel. No such evidence appearing, I have dismissed that allegation herein.

[32] 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[33] "The General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. [citation omitted]." *American Gardens Management Co.,* 338 NLRB 644, 645 (2002).

[34] A "preponderance" of evidence means that the proffered evidence must be sufficient to permit the conclusion that the proposed finding is more probable than not. McCormick Evidence, at 676–677 (1st ed. 1954).

NLRB 1064 (1999); *T&J Trucking Co.,* 316 NLRB 771 (1995). The burden shifts only if the General Counsel establishes that protected conduct was a "substantial or motivating factor in the employer's decision." *Budrovich Contracting Co.,* 331 NLRB 1333, 1333 (2000). Put another way, "the General Counsel must establish that the employees' protected conduct was, *in fact,* a motivating factor in the [employer's] decision." *Webco Industries,* 334 NLRB 608 fn. 3 (2001).

The elements of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.,* 303 NLRB 638, 649 (1991). Here, these elements are clearly met for both Torres and Martinez, the former of whom engaged in the protected activities of picketing and wearing union buttons, the latter of whom engaged in the protected activities of picketing and collecting employee signatures on a work-related petition. Respondent was well aware of Torres' support for the Union it and disapproved of it as demonstrated by Ramirez' warning to Torres that he should not use the [union] buttons. Ramirez' warning to Torres that what he was doing was not helping him, could only have related to Torres' union activities, and demonstrated both knowledge and animosity. As for Martinez, both Graff and Ramirez observed him collecting employee signatures, and Ramirez threatened to report him for it. When demoting Martinez to DRA on December 21, 2003, and sending him home early on December 25, 2003, Graff ascribed the actions to a desire to teach Martinez not to picket, as did Braswell when suspending/terminating Martinez.

In these circumstances, I find the General Counsel has made "an initial 'showing sufficient to support the inference that protected conduct was a motivating factor'" in Respondent's decision to discharge Torres and to demote, suspend, and discharge Martinez. *American Gardens Management Co.,* 338 NLRB at 645; *Tom Rice Buick, Pontiac & GMC Truck,* 334 NLRB 785, 786 fn. 6 (2001). This finding "does not mean that [any action, including] discharge was in fact 'unlawfully motivated.'" *American Gardens,* supra at 645. As the Board has noted, "The existence of protected activity, employer knowledge of the same, and animus . . . may not, standing alone, provide the causal nexus sufficient to conclude that the protected activity was a motivating factor for the adverse employment action." *Shearer's Foods, Inc.,* 340 NLRB 1093, 1094 fn. 4 (2003); see also *American Gardens,* supra at 645. However, the General Counsel having met his initial burden, the burden of proof shifts to Respondent to show the personnel actions against Torres and Martinez would have (not just could have) occurred even in the absence of their union support. *Avondale Industries, Inc.,* supra at 1066.

Discharge of Juan Torres

Respondent contends it discharged Torres for (1) his failure to report to work on December 27, 2003, (2) poor performance, and (3) job abandonment on January 5. During the first week of Respondent's Hotel management, it changed the weekly banquet schedule period from Monday through Saturday to Saturday through Friday. Torres inadvertently failed to note the changed schedule and missed his scheduled shift on December 27, 2003. Respondent argues that Torres must have known he was scheduled to work on December 27, 2003, and its discharge of him for failing to work is nondiscriminatory. I have accepted Torres' assertion that he did not know he was scheduled to work on December 27, 2003, but even if I were to accept Respondent's contention that Torres knowingly missed a scheduled shift, I could not accept Respondent's claim that it fired him for that reason. As noted, Respondent never sought an explanation from Torres' for his missed shift or even mentioned the matter to him until January 14 when Ramirez cited the incident as one of the bases for discharge. The evidence thus clearly establishes that the first basis for Torres' discharge was either false or not relied upon and was consequently pretextual. *Golden State Foods Corp.,* 340 NLRB 382, 383 (2003).

The second basis, poor performance, is unsupported. As to poor performance generally, both Braswell and Ramirez were vague as noted above, and I cannot accept that either one considered Torres to be a poor worker. As for the specific example Braswell and Ramirez gave of Torres' New Year's Eve failure to respond to Ramirez' radio calls, I have found both accounts to be vague, inconsistent, and unreliable as described above. I find Braswell and Ramirez either concocted or exaggerated an incident too minor to have warranted supervisory attention in order to bolster the discharge case against Torres. Such was pretextual.

Respondent's third charge against Torres of leaving early is also flawed. Although Ramirez claimed Zambrano had denied giving Torres permission to leave early, he told Braswell Zambrano had admitted giving permission. Although Braswell initially insisted Torres knew Zambrano had no authority to give such permission because Torres had earlier grieved a similar situation, later evidence established that Torres was not the grievant, and there is no reliable evidence that Torres knew Zambrano could not permit him to leave early. Although Respondent asserts that Zambrano wrongfully gave permission to Torres to leave early, there is no evidence Respondent so much as reproved Zambrano for having done so until Respondent issued him a written warning in March. By that time, the Union had filed unfair labor practices against Respondent, and, under all the circumstances, it is reasonable to infer that the written warning to Zambrano was another effort to bolster Respondent's defense. Such an inference is particularly warranted since the written warning issued to Zambrano also cited leaving work early on January 5 as an infraction although Ramirez, who signed the warning, testified he had given Zambrano permission to leave early that day. The contradictions and inconsistencies surrounding this charge against Torres show it was also pretextual.

In sum, Respondent has failed to meet its burden to show it would have discharged Torres notwithstanding his protected activities and its animus thereto. Accordingly, I find Respondent violated Section 8(a)(3) of the Act when it discharged Torres.

Demotion, Suspension, and Discharge of Joel Martinez

Respondent demoted Martinez to DRA for one shift on December 21, 2003. The burden having shifted to Respondent to show the demotion would have occurred even in the absence of Martinez' protected activities, Respondent must provide a persuasive rationale for the demotion. Although Respondent contends it demoted Martinez because he had stolen a table from another server, for the reasons noted above, I cannot accept that explanation. Since Respondent's asserted reason for demoting Martinez fails, Respondent has not met its burden of proof, and the General Counsel's evidence of unlawful motivation pre-

vails. Accordingly, I find Respondent demoted Martinez to DRA on December 21, 2003, because of his union activities in violation of Section 8(a)(3) of the Act.

The General Counsel alleges Respondent unlawfully suspended Martinez on December 25, 2003, by sending him home early because of his union activities. As noted above, I have credited Martinez' testimony that Graff sent him home that day with an admonition to "learn the lesson not to be on the picket line." Graff's giving Martinez an unlawful reason for sending him home strongly evidences unlawful motivation. Moreover, for the reasons given earlier, I am unable to credit Graff's explanation for sending Martinez home. Accordingly, Respondent has not met its burden of proof, and the General Counsel's evidence of unlawful motivation prevails. I find Respondent temporarily suspended Martinez on December 25, 2003, in violation of Section 8(a)(3) of the Act.

The General Counsel alleges that Martinez' suspension of January 16 and his discharge of January 22 were discriminatory. Respondent contends it suspended and then discharged Martinez for two principal, nondiscriminatory reasons: (1) Martinez' dishonesty in initially denying leaving work without permission and his dishonesty in claiming that a union steward, Donaldson, had said Respondent was trying to fire Martinez, (2) Martinez' abandoning his job on January 9. As to Respondent's contention regarding dishonesty, I cannot conclude Respondent had any genuine concern about Martinez' alleged misrepresentation of a conversation with a union steward. Respondent made no reference to dishonesty on the January 16 Disciplinary Action Report issued to Martinez, and Respondent's focus on dishonesty appears to be very much an afterthought. I find Respondent's position to be weakened by asserting an invalid basis for discharge. As to the contention regarding initial false denial of leaving early, it is clear Respondent had made its suspension/termination decision before Martinez ever denied misconduct, and his denial cannot, therefore, have been a factor in the discipline.

Respondent's contention regarding job abandonment has more substance. As set forth above, I have found Martinez did, in fact, leave work on January 9, ignoring a supervisory directive to do silverware rollups. Counsel for the General Counsel argues the discharge was a suspiciously harsh consequence for leaving work, but I cannot agree. I find Martinez' intentional flouting of a work order could well constitute a legitimate basis for discharge. It is not for the Board to decide "whether a nondiscriminatory reason for discharging an employee is wise or well supported,"[35] and it is well established the Board "cannot substitute its judgment for that of the employer and decide what constitutes appropriate discipline."[36] Nonetheless, the Board's role is to ascertain whether an employer's proffered reasons for disciplinary action are the actual ones. Ibid. In determining Respondent's actual motivation for discharging Martinez, I have considered, as discussed below, Respondent's animus toward Martinez, its alleged bases for his final suspension and discharge, and its discipline of other employees.

It is clear Respondent bore considerable animus toward Martinez for his protected activities. However, the fact that an employer may desire to retaliate against employees or to curtail union activities does not, of itself, establish the illegality of a discharge. If an employee provides an employer with sufficient cause for dismissal by engaging in conduct that would, in any event, have resulted in termination, the fact the employer welcomes the opportunity does not render the discharge unlawful. *Avondale Industries, Inc.*, supra; *Klate Holt Co.,* 161 NLRB 1606, 1612 (1966).

At the hearing, Respondent offered evidence of numerous problems with Martinez' work prior to his suspension/discharge as support for its action. According to Braswell, Martinez had a proclivity for stealing tables, one instance of which Braswell observed sometime in the latter part of 2003. Braswell also thought Martinez did not address his tables quickly enough and claimed Martinez "inevitably" disappeared during his shift. Braswell also complained that Martinez had, in the past, untruthfully told Braswell he had permission to be away from his assigned banquet room. Graff testified that Martinez was the object of frequent table-stealing complaints from other servers and that no one liked to work with him because he was rude and uncooperative. Both Graff and Braswell named Hatfield as a server who complained about Martinez. However, neither she nor any other disinterested party testified about Martinez' alleged misconduct. In fact, none of these complaints was substantiated, and none resulted in any discipline. Moreover, if the described misconduct had in fact occurred, it was well before Respondent's takeover of the Hotel, and Braswell testified that employees hired by Respondent on December 18, 2003, had started with a new slate. I can only infer from Respondent's alleging past, unsubstantiated, and undisciplined misconduct as a basis for Martinez' discharge that Respondent, in preparing a defense against the instant charges, threw as many accusations against Martinez as it could conceive, hoping some of them would stick. Respondent's disingenuousness as to Martinez' past performance strongly suggests its motive in suspending Martinez on January 16 and discharging him on January 22 was unlawful.

In evaluating Respondent bases for discharging Martinez, I have also considered Respondent's discipline of other employees. There is no evidence of Respondent having dealt with any employee in the same situation as Martinez, i.e., reporting to work to find an assignment cancelled and leaving work without performing an alternate assignment. The disciplinary records in evidence for employees of the banquet department during the relevant period show that Respondent has issued written warnings to employees for not reporting to work as scheduled (no-call/no show). Employees who walk off the job have been dealt with more summarily: two employees, identified herein as AC and CV, walked off the job; both were suspended, and both were terminated. There is no evidence either had prior warnings. From this disciplinary evidence, it is apparent Respondent viewed employees' no-call/no-shows as less egregious than walking off the job. The former generated warnings, the latter terminations. The question is to which category Martinez' conduct on January 9 can be more closely analogized.

It might be argued that Martinez' conduct in failing to appear in the banquet office to roll up silverware as directed on January 9 was comparable to a no-call/no-show, i.e., Respondent gave Martinez an assignment, and he failed to show up for it, just as a no-show/no-call fails to appear for a scheduled shift. If that view were accepted, then the appropriate discipline, based on Respondent's past practice, would be a written warning. On the other hand, Martinez' conduct can arguably be compared to walking off the job, i.e., he appeared for work at

[35] *West Limited Corp.,* 330 NLRB 527 fn. 5 (2000).

[36] *Detroit Paneling Systems, Inc.,* 330 NLRB 1170, 1171 fn. 6 (2000), and cases cited therein.

the Hotel and, after being given an assignment, left the Hotel without permission and without carrying out the assignment. If that view were accepted, Respondent's past practice would decree discharge as the appropriate discipline.

Martinez' January 9 behavior is not clearly analogous to either no-show/no-call or walking-off-the-job conduct. While no-call/no-shows never appear at the Hotel to work their shifts, Martinez actually arrived at the Hotel, albeit not to roll up silverware, and then left contrary to supervisory direction. Respondent might reasonably regard this conduct as more insubordinate than simply not reporting to work. Neither, however, does walking-off-the-job clearly describe Martinez' behavior. There are significant differences between the misconduct of AC and CV, which resulted in their terminations, and that of Martinez. Martinez did not walk off the job during a regularly scheduled shift. Rather, he reported to work as scheduled to find his event had been canceled. Jaramillo then directed Martinez to roll silverware, a job entirely different from the one he had been scheduled to perform and for which he reported to work. Martinez had not commenced any work for Respondent before leaving the Hotel; he had not even punched in. Given these facts, I cannot find Martinez' conduct comparable to either that of no-call/no-shows or that of employees who walk off the job, and I cannot use the discipline meted to them as a paradigm for Martinez' discipline. I do not, therefore, find that based on past disciplinary practice, Respondent would have discharged Martinez for his January 9 actions.

I have found Martinez intentionally did not comply with Jaramillo's January 9 direction to roll silverware but instead left the Hotel. I also find his doing so was grounds for discipline, perhaps even discharge. But the question is not whether Respondent could have discharged Martinez for his conduct but whether Respondent did, in fact, do so. In other words, Respondent's motive in discharging Martinez must be determined. In reaching my conclusion as to Respondent's motive, I have considered Respondent's witnesses' credibility deficiencies as detailed above, Respondent's unreliable cataloging of other alleged misconduct by Martinez, and Respondent's 8(a)(1) conduct. I have also considered that, in contrast to AC and CV's terminations, both of which were effected within a day of their walking off the job, Respondent engaged in inexplicable delay in suspending/terminating Martinez. Thus, Martinez worked on January 10 and 11, and was requested to work on January 12, without any supervisor mentioning the January 9 incident to him. Finally, I have credited Martinez' testimony that when alone with Braswell during the discipline meeting on January 16, Braswell told him the discipline would teach him not to picket. Braswell's statement clearly links the imposed discipline to Martinez' protected activities and provides compelling evidence of Respondent's unlawful motive.

In these circumstances, I find Respondent did not meet its burden of proving that it would have suspended and later terminated Martinez even in the absence of his protected activities. Accordingly, I find Respondent violated Section 8(a)(3) and (1) of the Act by suspending and terminating Martinez on January 16 and 22, respectively.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act by

(a) Impliedly threatening employees with retaliation for engaging in the protected activity of circulating and/or signing an employee petition regarding terms and conditions of employment.

(b) Impliedly threatening employees with retaliation for engaging in the protected activity of wearing union buttons.

(c) Restraining and coercing employees in the exercise of their Section 7 rights by portraying the Union, their collective-bargaining representative, as weak or ineffectual or conveying the impression that Respondent alone is in control of employees' terms and conditions of employment and thereby warning employees of the futility of supporting the Union.

(d) Restraining and coercing employees in the exercise of their Section 7 rights by directing that an employee be sent home for engaging in protected activity.

(e) Telling an employee he was temporarily demoted to teach him not to engage in the protected activity of picketing.

(f) Telling an employee he was being sent home from work early to teach him not to engage in the protected activity of picketing.

(g) Restraining and coercing employees in the exercise of their Section 7 rights by warning an employee that picketing employees were making too much noise outside.

(h) Impliedly threatening retaliation for engaging in the protected activity of picketing by reminding an employee about the discharge of another employee.

(i) Telling an employee that a suspension/termination would give him time to think about engaging in protected activity and teach him not to picket.

2. Respondent violated Section 8(a)(3) and (1) of the Act on January 14 by discriminatorily discharging Juan Torres.

3. Respondent violated Section 8(a)(3) and (1) of the Act on December 21 and 25, 2003, January 16 and 22 by, respectively, discriminatorily demoting, discriminatorily temporarily suspending, suspending, and discharging Joel Martinez.

4. The following unit of Respondent's employees is appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time elevator operators, storeroom specialists, spa attendants and facilities employees employed by Respondent at its facility located at 1500 Orange Avenue, Coronado, California.

5. The Union has been at all times since November 7, 2003, and is now, the exclusive bargaining representative of the employees in the above-described unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. Respondent has violated Section 8(a)(5) and (1) of the Act since December 31, 2003 by failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of its employees in the above-described unit.

7. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent having discriminatorily discharged Juan Torres and Joel Martinez, it must offer them reinstatement insofar as it has not already done so and make them whole for any loss of

earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent having discriminatorily demoted and suspended Joel Martinez, it must make him whole for any loss of earnings and other benefits suffered as a result thereof. The recommended Order will also provide that Respondent bargain in good faith with the Union as the exclusive collective-bargaining representative of the above-described unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[37]

ORDER

The Respondent, KSL DC Management, LLC d/b/a Hotel del Coronado, Coronado, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union as the exclusive bargaining representative of its employees in the above-described unit.

(b) Demoting, suspending, or discharging any employee for engaging in union or other concerted protected activities.

(c) Impliedly threatening employees with retaliation for engaging in the protected activity of circulating and/or signing an employee petition regarding terms and conditions of employment.

(d) Impliedly threatening employees with retaliation for engaging in the protected activity of wearing union buttons.

(e) Restraining and coercing employees in the exercise of their Section 7 rights by portraying the Union, their collective-bargaining representative, as weak or ineffectual or conveying the impression that Respondent alone is in control of employees' terms and conditions of employment and thereby warning employees of the futility of supporting the Union.

(f) Restraining and coercing employees in the exercise of their Section 7 rights by directing that an employee be sent home for engaging in union or other concerted protected activity.

(g) Restraining and coercing employees in the exercise of their Section 7 rights by telling employees they are being disciplined to discourage their protected activities.

(h) Restraining and coercing employees in the exercise of their Section 7 rights by warning that picketing employees are making too much noise.

(i) Impliedly threatening retaliation for engaging in the protected activity of picketing by reminding an employee about the discharge of another employee.

(j) Telling an employee that a suspension/termination would give him time to think about engaging in protected activity and teach him not to picket.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) On request, bargain with the Hotel Employees and Restaurant Employees International Union, Local 30, AFL–CIO, CLC as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time elevator operators, storeroom specialists, spa attendants and facilities employees employed by Respondent at its facility located at 1500 Orange Avenue, Coronado, California.

(b) Within 14 days from the date of this Order, insofar as it has not already done so, offer Juan Torres and Joel Martinez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Juan Torres and Joel Martinez whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(d) Expunge from its files any reference to the unlawful discharges or other discipline of Juan Torres and Joel Martinez and thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its hotel in Coronado, California copies (in English and Spanish) of the attached notice marked "Appendix."[38] Copies of the notice, on forms provided by the Regional Director for Region 21 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since December 18, 2003.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed inso-

[37] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[38] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

far as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly,

WE WILL NOT fail and refuse to recognize and bargain with the Hotel Employees and Restaurant Employees International Union, Local 30, AFL–CIO, CLC (the Union) as the exclusive bargaining representative of its employees in the following unit:

All full-time and regular part-time elevator operators, storeroom specialists, spa attendants and facilities employees employed by Respondent at its facility located at 1500 Orange Avenue, Coronado, California.

WE WILL NOT discharge or demote or suspend or otherwise discipline any of you for supporting the Union or participating in other concerted protected activities.

WE WILL NOT impliedly threaten you with retaliation for engaging in the protected activity of circulating and/or signing an employee petition regarding terms and conditions of employment.

WE WILL NOT impliedly threaten you with retaliation for engaging in the protected activity of wearing union buttons.

WE WILL NOT impliedly threaten you with retaliation for engaging in the protected activity of picketing.

WE WILL NOT portray the Union as weak or ineffectual or suggest that it is useless to support the Union.

WE WILL NOT direct that an employee be sent home for engaging in the protected activity of picketing.

WE WILL NOT tell employees they are being disciplined to discourage their protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the above-described bargaining unit.

WE WILL, within 14 days from the date of the Board's Order, insofar as we have not already done so, offer Juan Torres and Joel Martinez full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Juan Torres and Joel Martinez whole for any loss of earnings and other benefits resulting from their unlawful

discharges and other discipline, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and discipline of Juan Torres and Joel Martinez and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and discipline will not be used against them in any way.

KSL DC MANAGEMENT, LLC D/B/A HOTEL